Office-Supreme Court, U.S.
FILED
JUL 3 1974
MICHAEL RODAK, JR., CLERK

No. 73-1981

In the Supreme Court of the United States

OCTOBER TERM, 1973

LENA GLIMCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Lena Glimco, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment against her entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in United States of America v. Joseph P. Glimco and Lena Glimco, No. 73-1767, was entered on February 22, 1974 as an unpublished order not to be cited per Circuit Rule 28. It is printed in the Appendix to this Petition. (App. 1-5)

JURISDICTION

The judgment of the Court of Appeals affirming the District Court decision was entered on February 22, 1974. (App. 1-5) A timely Petition for Rehearing was denied on April 9, 1974. (App. 6)

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the defendant, Lena Glimco, can assert the defense of "innocent spouse" as provided by Section 6013(e) of the Internal Revenue Code of 1954, in a suit for collection.

2. Once the tax liability of married persons filing joint income tax returns has been established through the Tax Court and courts of review, and a suit for collection has been instituted by the United States, can an "innocent spouse" under the Revenue Code secure relief under the plain wording of the Statute.

3. If a statute is clear and unambiguous on its face, can it judicially be interpreted, or should it be held to mean what is plainly states.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.

* * *

(e) *Spouse Relieved of Liability in Certain Cases.*—

(1) *In General.*—Under regulations prescribed by the Secretary or his delegate, if—

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 per cent of the amount of gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and

(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, *it is inequitable to hold the other spouse liable for the deficiency* in tax for such taxable year attributable to such omission,

then *the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year* to the extent that such liability is attributable to such omission from gross income.

(2) *Special rules.*—For purposes of paragraph (1)—

(A) the determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws, and

(B) the amount omitted from gross income shall be determined in the manner provided by section 6501(e)(1)(A). (Emphasis supplied)

LEGISLATIVE HISTORY

Senate Report No. 91-1537 (U.S. Code Congressional and Administrative News, 91st Cong., Sec. Session 1970, Vol. III p. 6089 at 6093) reads in pertinent part as follows:

• • •

> The amendments made by this bill are to apply to all taxable years to which the Internal Revenue Code of 1954 applies and corresponding provisions are to be deemed included in the Internal Revenue Code of 1939 and are to apply to all taxable years to which that code applies. The bill, of course, does not open a year which has been closed by the statute of limitations, res judicata, or otherwise.

STATEMENT OF FACTS

On June 30, 1961, the Internal Revenue Service sent statutory notices of deficiencies to the defendants Joseph P. and Lena Glimco, claiming deficiencies in income tax reported on their joint income tax returns for the years 1954, 1955, 1956 and 1957. The Internal Revenue Service claimed that certain amounts paid by Joseph P. Glimco's local union to defense attorneys to defend criminal charges against him were includable in gross income. The defendants' failure to include these amounts in gross income reported on their returns for the years in question created the alleged deficiencies.

On September 27, 1961, Joseph P. and Lena Glimco filed their petition in the United States Tax Court to contest these deficiencies, contending (1) that the legal fees paid by the union were not includable in the petitioners' gross income, and (2) that if the fees were includable, then they were deductible as ordinary business expenses. The Tax Court, in a decision entered July 20, 1967 (T.C. Memo. 1967-119) decided both of these issues against the peti-

tioners and ruled that there were deficiencies for the years in question. Pursuant to this decision, the deficiencies were assessed against the defendants on September 8, 1967.

The decision of the Tax Court was then appealed by the taxpayers to the United States Court of Appeals for the Seventh Circuit where the decision was upheld (397 F.2d 537). The taxpayers then sought a writ of certiorari in the United States Supreme Court and were denied (393 U.S. 981).

The United States filed the complaint in this action against Joseph P. and Lena Glimco to collect the taxes which were assessed against them jointly, pursuant to the Tax Court decision. Defendant Lena Glimco filed a motion to dismiss the complaint as to her, claiming that Secton 6013 which was amended by Public Law 91-679, 84 Stat. 2063,[1] relieves her of joint liability for the years in question. The United States opposed this motion on the grounds that Lena Glimco is not eligible to claim the protection of Section 6013(e) since her liability has been determined by the Tax Court of the United States. The District Court found Lena Glimco not eligible to claim the protection of Section 6013(e) and the Court of Appeals affirmed that decision.

Throughout the proceedings in the District Court and in the Court of Appeals there was no contention made as to the correctness of the deficiency charged in the Complaint in the United States District Court. The suit below was not in any way utilized as a vehicle for petitioner to relitigate the correctness of the amount of tax assessed.

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[1] This law was passed after the denial of the Writ of Certiorari but before the suit for collection.

REASONS FOR GRANTING THE WRIT

I. This case presents an important question which has not been, but should be, decided by this Court. When the Congress passed the "Innocent Spouse Act", it was in recognition of the injustice against such persons under the tax laws. It was meant "to apply to all taxable years to which the Internal Revenue Code of 1954 applies * * *" (Legislative History). The Government and the Courts below have espoused a narrow construction of the statute which completely emasculates the fine sense of honor which had brought this statute into being. The statute has been given a niggardly interpretation when it was intended to be read in a kindred spirit.

II. This Court should resolve the obvious conflict between (1) the plain meaning of the statute, (2) the Legislative History and (3) the interpretation placed upon it by the Courts below. Its impact on literally thousands of persons who may be an "innocent spouse" should be resolved by this Court.

I.

Section 6013 of the Internal Revenue Act (26 U.S.C. §6653) so far as it is pertinent, provides that:

> "(e) Spouse Relieved of Liability in Certain Cases—
>
> "(1) In General. — Under regulations prescribed by the Secretary or his delegates . . ."

Under those proposed regulations — legislative authorized — the word "liability" has not been circumscribed — as the Court below would have it — to final adjudica-

tions by the Tax Court. Rather, it refers to a "liability for any tax, penalties, additions to tax, interest, *or other amounts* to the extent that such liability is attributable to an omission from gross income in taxable year, . . ." (26 CFR Parts 1, 301, §1.6013-5(a)). The "Order" (decision) gives a niggardly interpretation, which is diametrically in conflict with the expansive, generous and remedial direction expected to be employed by the Regulation, which being legislatively authorized, has the force and effect of the law that authorized its making. We submit, on the basis of giving this restrictive interpretation, the Court erred.

We also suggest the legislative history affirmatively rejects this limited interpretation. The Committee Report on P.L. 91-679, House Ways and Means Committee, 1971 C.C.H. Stand. Fed. Tax Rep., ¶5018.04 provides in part:

> "The amendments made by this bill are to apply to all taxable years to which the Internal Revenue Code of 1954 applies and corresponding provisions are to be deemed included in the Internal Revenue Code of 1939 and are to apply to all taxable years to which that code applies."

A certain indication of an intention of this limited retroactivity is eminently apparent. We feel certain the Congress does not ascribe to the Internal Revenue Service a necessity that it (the Congress) give the Service thirty-two years to ferret out income understatements.

We also submit the restrictive interpretation violates the intent of the legislature. When the law-makers act to remedy injustices, the policy of the law is to accord such remedy a generous reception unless it clearly directs its operation be clearly prospective. That policy would certainly be accentuated when its objective is to protect the rights of property of innocent persons. Therefore, the

Statute articulates the criteria of the necessary elements to qualify as the "innocent spouse."

Underlying the protection of the statute is the recognition that many a good woman (or man) has become enamoured of a knave, a cheat and even a thief. Coupled with this is the Government incentive and encouragement that the married couple save tax money by filing jointly —without the warning that his (or her) duplicity may wipe out her (or his) private estate, and that honestly and drudgingly earned by parents or grandparents. There is, thus, raised the Constitutional problem of whether an ill-placed confidence in a spouse which led to signing a document—later found to contain the guilty spouse's substantial variations—is the due process of law in the deprivation of property contemplated by the Fifth Amendment.

Petitioner became defendant in a brand new lawsuit—authorized by law and within the limitations period—the suit for collection. The matters litigated to wit: the determination of the deficiency was not raised. A newly authorized defense, obviously never litigated, was. *Res judicata* does not apply.

The narrow construction of this statute by the courts below should not stand.

II.

Section 6013(e) is clear on its face. It provides that "If * * * it is inequitable to hold the other spouse liable for the deficiency in tax * * *, then the other spouse shall be *relieved of liability* for tax * * *" (Emphasis ours)

Certainly there should be no question that Congress had the power to relieve an innocent taxpayer of an established tax burden. It is equally well established that if the statute is clear and unambiguous on its face it should not

be interpreted but must be held to mean what it plainly states. On many occasions this Court has spoken in the area of construction of statutes. The following are but a few observations which have been made by the Court. "Whatever the consequences, we must accept the plain meaning of plain words." Holmes: *United States* v. *Brown*, 206 U.S. 240, 244. "When we depart from the words ambiguity comes." McKenna: *Rhode Island* v. *Palmer*, 253 U.S. 350, 398. "We have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute." Cardozo: *United States* v. *Great Northern Railway*, 287 U.S. 144, 154. "Whatever the reason, words mean what they say." Douglas: *Singer* v. *United States*, 323 U.S. 338, 346. "Whatever the scope of power, we are reminded of our duty to strain constructions to the uttermost if by so doing we can give relief from injustice or oppression." Cardozo: *Thomann* v. *City of Rochester*, 256 N.Y. 165, 173-174.

Probably the most cogent statement was made by Mr. Justice Holmes in a treatise entitled "The Theory of Legal Interpretations" 12 Harv. L.Rev. 419. There he stated: "We do not inquire what the legislature meant; we ask only what the statute means."

The case before the district court was a suit by the government against the taxpayers to enforce the liability. We again remind the Court that Lena Glimco is not attempting to open up or contest the finality of the amount found to be due and owing. Congress did not want the question of relief under 6013(e) to be a vehicle for one of the parties to reargue the amount of the original tax liability. The only question here is whether the clear wording of the statute that the spouse shall be relieved of liability is appropriate as a defense to the action which

in essence is the enforcement of her liability to respond to the determined tax liability.

If the statute is clear, then no recourse of legislative history is warranted or needed to understand its meaning. §6013(e) relieves an innocent spouse of tax liabilities for the years covered by the 1954 Code if the spouse meets the three statutory tests. There is no question in this case that Lena Glimco meets the three statutory tests and the years involved are in fact covered by the 1954 Code.

The Government's defense to the taxpayer's motion for relief was that these periods were closed by res adjudicata and, therefore, §6013(e) of the Internal Revenue Code does not apply. The reason for this view is the Government's position that the legislative history of §6013(e) indicates that relief does not extend the tax liabilities established prior to its enactment. The Senate Finance Committee Report on §6013(e) in the last sentence stated that "the bill, of course, does not open a year which has been closed by the Statute of Limitations, res adjudicata or otherwise." It is suggested that the Government, in advancing this narrow construction of the statute has grossly misinterpreted that sentence. That sentence simply states the obvious, that the bill will not permit the taxpayer or the Government to *relitigate* the *correctness* of the amount of tax assessed for the year in question if that issue has once been litigated; if the usual period of limitations is expired or if the issue is otherwise closed.

We respectfully submit that this Court should adopt the view that the last sentence only bars a litigation of the correctness of the amount of the taxes assessed. Both the report and the statute can then be harmonized with an entirely sensible result. Thus, the relief provided by §6013(e) applies to all liabilities for taxable years under

the 1954 Code, (provided the requirements of §6013(e) are satisfied) but neither the taxpayer nor the Government may by reason of the bill reargue whether the amount of the tax assessed was correct.

CONCLUSION

Wherefore, this Petitioner respectfully prays the Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
Attorney for Petitioner, Lena Glimco.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 22, 1974

February 22, 1974

Before

Hon. Latham Castle, Senior Circuit Judge
Hon. Roger J. Kiley, Senior Circuit Judge
Hon. John Paul Stevens, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 73-1767 vs.

JOSEPH P. GLIMCO and LENA GLIMCO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

NO. 70 C 289

Edwin A. Robson, Judge.

ORDER

On June 30, 1961, the Commissioner of Internal Revenue informed appellant and her husband that they had underpaid their joint income tax for the years 1954-57 by nearly $200,000. They then sought review by the Tax Court, which upheld the Commissioner's determination.

The deficiencies were assessed against appellant and her husband some two months later. This court affirmed the decision of the Tax Court, and, on December 9, 1968, the Supreme Court denied certiorari. *Glimco* v. *Commissioner*, 397 F.2d 537 (7th Cir. 1968), *cert. denied*, 393 U.S. 981.

Pursuant to 26 U.S.C. §§ 7401 & 7403, the government commenced this action against appellant and her husband to reduce the tax assessments to judgment and to foreclose the federal liens against certain property. Jurisdiction was properly predicated upon 26 U.S.C. § 7402 and 28 U.S.C. §§ 1340 & 1345. Appellant moved to dismiss on the basis of the "Innocent Spouse Statute." This statute, enacted some two years after the Tax Court's decision became final,[1] relieves certain spouses of tax liability attributable to income omitted from a joint return by the other spouse.[2] The district court denied the motion, *United*

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[1] The Tax Court's determination that appellant and her husband were liable for the taxes involved in the present case became final when the Supreme Court denied certiorari. 26 U.S.C. § 7481(2)(B).

[2] The statute provides:

(e) Spouse Relieved of Liability in Certain Cases.—

(1) In general.—Under regulations prescribed by the Secretary or his delegate, if—

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and

(C) taking into account whether or not the other spouse significantly benefitted directly or indirectly from

(footnote continued on next page)

States v. *Glimco,* 331 F.Supp. 449 (N.D. Ill. 1971), and later entered judgment in favor of the government.

Appellant's sole contention is that the district court erred in denying her motion to dismiss. The district court's determination, however, was in accord with our decision in *United States* v. *Zimmerman,* 478 F.2d 59 (7th Cir. 1973). There we held that: 1) an innocent spouse may not utilize § 6013(e) to challenge a tax liability which has been conclusively determined; and 2) a Tax Court decision on the innocent spouse's liability which has become final is conclusive. We rejected the contention, also made here. that the enactment of § 6013(e) subsequent to a final Tax Court decision precludes this decision from being conclusive.

(Footnote continued)

> the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission,
>
> then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.
>
> (2) Special rules.—For purposes of paragraph (1)—
>
> (A) the determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws, and
>
> (B) the amount omitted from gross income shall be determined in the manner provided by section 6501(e)(1)(A).

In § 3 of Pub. L. No. 91-679 Congress provided in part that this statute "shall apply to all taxable years to which the Internal Revenue Code of 1954 applies."

Appellant did not consider the applicability of *Zimmerman* in her briefs. At oral argument, however, counsel attempted to distinguish *Zimmerman* on two points. First, the innocent spouse in *Zimmerman* consented to entry of judgment against her by the Tax Court. She also filed an answer in the district court which admitted her liability and consented to entry of judgment against her for the amount requested by the government. Based upon these facts, we noted that the spouse waived her right to appeal not only the Tax Court decision but also the district court's decision. 478 F.2d at 62. According to appellant, *Zimmerman* thus stands for the proposition that an innocent spouse who, at any time, fails to contest her liability may not avail herself of § 6013(e); since appellant has continuously challenged her liability (in the original action and in the present action), *Zimmerman* is inapplicable.

Zimmerman should not be read so narrowly. With respect to the appeal of the Tax Court decision, waiver was important only insofar as it established that that decision was final. In the present case, it is irrelevant that appellant did not waive any right to appeal the Tax Court ruling. As already noted, that ruling became final when the Supreme Court denied certiorari. 26 U.S.C. § 7481. With respect to the appeal of the district court decision, we carefully indicated that waiver was an *alternative* ground for our decision. 478 F.2d at 62 n. 2. It in no way affected our primary holding (which has already been detailed).

Appellant's second distinction is that the spouse in *Zimmerman* did not assert § 6013(e) in the district court. Thus, according to appellant, *Zimmerman* simply stands for the proposition that an argument may not be made for the first time on appeal. While the spouse's failure to raise the § 6013(e) argument troubled Judge Pell in his

concurring opinion, 478 F.2d at 64, it formed no basis for the majority opinion.

In her reply brief appellant lists several arguments which, in effect, state that *Zimmerman* was incorrectly decided. Each of these arguments had previously been advanced by the plaintiff-appellant in *Mitchell* v. *Commissioner,* No. 73-1766 (7th Cir. 1974), which was heard by this court on the same day as the instant appeal. We rejected these arguments in *Mitchell* and reject them here.

In sum, we believe that the present case falls squarely within our holding in *Zimmerman* and that this holding is correct. Consequently, the district court properly denied appellant's motion to dismiss and entered judgment for the government.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
April 9, 1974.

Before

Hon. Latham Castle, Sr. Circuit Judge
Hon. Roger J. Kiley, Sr. Circuit Judge
Hon. John Paul Stevens, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 73-1767 vs.

JOSEPH P. GLIMCO and LENA GLIMCO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(70 C 289)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1981

LENA GLIMCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks to invoke Section 6013(e) of the Internal Revenue Code of 1954, to obtain relief from a decision of the United States Tax Court which had become final more than two years before the statute was enacted. Section 6013(e), known as the "innocent spouse" statute, relieves certain spouses of tax liability attributable to income omitted by the other spouse from a joint income tax return.

The Tax Court (26 T.C.M. 547) had held in the prior case in 1967 that petitioner and her husband Joseph P. Glimco were jointly liable for deficiencies in income tax of approximately $200,000 for the years 1954 through 1957. The court of appeals affirmed (397 F. 2d 537), and this Court denied certiorari (393 U.S. 981). Subsequently, on January 12, 1971, Congress added Section 6013(e) to the Code.[1]

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[1]P.L. 91-607, 84 Stat. 2063.

In this case, which arose as a collection action commenced by the government in the United States District Court for the Northern District of Illinois against petitioner for the deficiencies upheld in the prior action, petitioner raised Section 6013(e) as a defense. Both the district court and the court of appeals rejected petitioner's claim under Section 6013(e) and entered judgment for the government (Pet. App. A 1-5).

2. The innocent spouse provision does not apply to the deficiencies determined against petitioner. As the court of appeals correctly recognized, the legislative history of Section 6013(e) specifically states (S. Rep. No. 91-1537, 91st Cong., 2d Sess., p. 4):

> The bill, of course, does not open a year which has been closed by the statute of limitations, *res judicata*, or otherwise. [Emphasis added.]

The decision below is in accord with the legislative history and with other decisions which have also refused to apply the statute to reopen closed taxable years. See *e.g.*, *United States* v. *Zimmerman*, 478 F. 2d 59 (C.A. 7); *United States* v. *Maxwell*, 459 F. 2d 22 (C.A. 5); *Sylk* v. *United States*, 331 F. Supp. 661 (E.D. Pa.).

These interpretations of the statute fully implement the congressional purpose. As this Court pointed out in *United States* v. *Zacks*, 375 U.S. 59, 65-68, "It is abundantly clear that Congress is aware of the limitations problem as it affects retroactive tax legislation" (*id.* at 65) and that Congress can, and on occasion does, include a provision expressly reopening barred tax years when it is enacting an amendment to the Internal Revenue Code. However, where as here, no such provision is included and the legislative history demonstrates the congressional intent not to reopen closed years, even a "remedial"

amendment cannot be read so broadly as to include relief which Congress chose to withhold. *United Sates* v. *Zacks*, *supra*, 375 U.S. at 68. Accord, *New York, Chicago and St. Louis Railroad Co.* v. *United States*, 331 F. 2d 865, 874 (Ct. Cl.).

Petitioner argues (Pet. 8, 10) that *res judicata* does not apply to this suit because she is not seeking to relitigate the correctness of the amount of tax as determined by the Tax Court, but, rather, to interpose a newly authorized defense to the liability. But once its jurisdiction is properly invoked, the Tax Court has the authority to "redetermine the correct amount of the deficiency" (Section 6214(a)), and that redetermination includes not only the amount of tax due but also the persons liable for it. The Tax Court's decisions, if not appealed or when finally affirmed on appeal, are binding adjudications which may not be reopened in a district court. *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620; *Schaffner* v. *Bingler*, 268 F. 2d 76 (C.A. 3); *United States* v. *Zimmerman*, *supra*, 478 F. 2d at 62.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

DOJ-1974-08